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In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel. Arizona Department of Revenue,

Petitioner,

vs.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

*On Writ of Certiorari to the
Arizona Court of Appeals, Division One*

**BRIEF OF AMICUS CURIAE SAN CARLOS APACHE
INDIAN TRIBE IN SUPPORT OF RESPONDENT**

RICHARD T. TREON

Counsel of Record

**TREON, STRICK, LUCIA
& AGUIRRE**

2700 North Central Avenue
Suite 1400
Phoenix, AZ 85004-1133
(602) 285-4400

STEVE M. TITLA

KEVIN L. PARSI

TITLA & PARSI, Attorneys at Law

Attorneys for Amicus Curiae

San Carlos Apache Indian Tribe

P.O. Box 1143

Globe, Arizona 85502

(520) 425-8137

148168

(800) 274-3321 • (800) 359-6859

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CONSENT OF PARTIES

Petitioner, and respondent have consented to the filing of this brief, *amici curiae*.¹

INTEREST OF THE *AMICI CURIAE*

Amici, a federally recognized Indian Tribe organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934 (48 stat. 984), has a vital interest in the legal issues that affect tribal self-government and sovereignty. Of obvious concern to *amici* is the Indian tribe's right to self-government to make decisions regarding its infrastructure on the reservation.

The issue in this case, whether Arizona's transaction privilege tax impermissibly interferes with an Indian tribe's right to self-government to make policy decisions regarding the welfare of its tribe, is of particular importance to *amici*. The Arizona Court of Appeals correctly applied a multi-factor balancing approach of Indian law preemption to invalidate the tax, an approach that carefully considered the affects of an Indian tribe's right of self-governance and tribal sovereignty.

Because of the importance of this issue to Indian tribes, *amici* submit this brief to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

Arizona's tax on respondent Blaze Construction Company's receipts from federal road-building contracts is invalid under principles of Indian law preemption. The Arizona Court of Appeals correctly applied Indian law preemption analysis to Arizona's transaction tax that significantly affects tribal self-government and tribal sovereignty. Under Indian law preemption analysis, Arizona's assessment of transaction privilege tax on Blaze Construction's gross receipts from building roads for Bureau of Indian Affairs (BIA) on Indian reservations should be preempted in light of comprehensive federal Indian policies and significant

1. Their consents have been filed with the clerk of this Court. This brief was authored by the amici and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than the amici and their counsel made any monetary contribution to the preparations or submission of this brief.

tribal interests. In addition, since the state has not provided any services related to on-reservation activities, it has no authority to impose the tax.

ARGUMENT

THE ARIZONA COURT OF APPEALS CORRECTLY HELD THAT ARIZONA'S ASSESSMENT OF TRANSACTION PRIVILEGE TAX ON CONTRACTOR'S GROSS PROCEEDS FOR BUILDING ROADS ON INDIAN RESERVATION IS PREEMPTED.

The Arizona Court of Appeals correctly held that the State could not impose its transaction privilege tax on Blaze Construction for work it performed pursuant to contracts it entered into with the Bureau of Indian Affairs to build road on Indian reservations in Arizona. The issue is whether the State's imposition of the transaction privilege tax unduly burden Indian tribe's right to self-governance and tribal sovereignty.

I. THE ARIZONA COURT OF APPEALS CORRECTLY APPLIED INDIAN PREEMPTION ANALYSIS ON STATE'S AUTHORITY TO IMPOSE A TRANSACTION PRIVILEGE TAX THAT SIGNIFICANTLY AFFECTS FEDERAL AND TRIBAL INTERESTS.

According to this Court, tribal sovereign immunity springs from the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting Felix S. Cohen, Handbook of Federal Indian Law 122 (1945)) (emphasis omitted). Against this backdrop of tribal sovereignty, when a State asserts authority over conduct of non-Indians engaging in activity (imposition of a transaction privilege tax) on the reservation, this Court should carefully evaluate the extent to which tribal self-government and tribal sovereignty is hindered. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334, 103 S. Ct. 2378, 2386 (1983). Therefore, the proper method to determine whether tribal sovereignty is limited under these circumstances is through a thorough Indian law preemption analysis. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578 (1980).

This Court articulated the modern formulation of Indian law preemption analysis in *White Mountain Apache Tribe*.

When on-reservation conduct involving Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is strongest. [Citations omitted]. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of *sovereignty that have developed from historical traditions of tribal independence*. This inquiry is not dependent on the mechanical or absolute conceptions of state sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake. . . .

Ibid. at 448 U.S. 136, 144-45, 100 S. Ct. 2578, 2584 (emphasis added). Since it is clear that Indian Tribe's play a fundamental role in determining what, if any, construction projects are granted by the Bureau of Indian Affairs, any imposition of state authority over the ability of the Indian Tribe's to exercise such authority must be carefully scrutinized. See 25 C.F.R. § 900.3(b)(5) ("tribal decisions to contract or not to contract are equal expressions of self-determination"). The fact that the BIA and not the Indian Tribe itself is a party to the contract is not dispositive of whether an Indian law preemption analysis is applicable. *White Mountain Apache Tribe*, at 148-49, 150-51, 100 S. Ct. at 2586-87, 2587.

In a number of cases we have held that state authority over non-Indians acting on tribal reservations is preempted even though Congress has offered no explicit statement on the subject. The Court has repeatedly emphasized that there is *a significant geographical component to tribal sovereignty, a component that*

remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

Ibid (emphasis added).

Therefore, Arizona's imposition of the transaction privilege tax on Blaze Construction on the gross proceeds from its contracts with the BIA can only be resolved by reference to Indian law preemption analysis as developed by this Court.

II. ARIZONA'S ASSESSMENT OF THE TRANSACTION PRIVILEGE TAX MUST BE PREEMPTED IN LIGHT OF SIGNIFICANT FEDERAL AND TRIBAL INTERESTS AND A LACK OF ANY SERVICES PROVIDED BY THE STATE.

As noted above, the formulation of the Indian preemption analysis was formulated in *White Mountain Apache Tribe*. *Ibid*. The test to determine whether the tax is valid must consider the state, federal and tribal interests and whether the exercise of state authority would violate federal law. *Ibid* at 448 U.S. at 145, 100 S. Ct. at 2584. "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State's interests at stake are sufficient to justify the assertion of State authority." *New Mexico*, 462 U.S. 324, 334, 103 S. Ct. 2378, 2386.

In the instant case, Arizona's tax infringes on the tribal right of self-governance and tribal sovereignty. Road construction is a central function of tribal government and affects the welfare and safety of its community members. As mentioned earlier, tribal governments have the authority to determine when, where and how roads will be built on the reservation. *See* 23 U.S.C. § 204(a), (e); 23 U.S.C. § 450a(b); 25 C.F.R. §§ 170.4a, 900.119. The imposition of the Arizona transaction privilege tax interferes with and may force tribes to enter into Self-Determination contracts. 25 C.F.R. §§ 271.1 through 271.5 (1996). In addition, the imposition of the tax is incompatible with the federal interest to channel as

much resources as possible toward building and improving reservation roads. *See* 137 Cong. Rec. S7787 (daily ed. June 13, 1991) (Statement of Sen. Domenici regarding increasing funding for Indian road program).

In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S. Ct. 1698 (1989), this Court was faced with a similar situation regarding the state's authority to tax on-reservation conduct involving non-Indians. This Court, after a careful analysis of federal, tribal and state interests, held that a New Mexico tax on on-reservation oil production was not pre-empted under Indian law preemption analysis. *Ibid*. This Court held that since the state regulated the reservation oil wells, there was sufficient state interest to justify the assertion of state authority. *Ibid*. In contrast, Arizona can claim no significant on-reservation activity related to this transaction privilege tax. *See* 25 C.F.R. §§ 170.1 through 170.9 (state has no official role in planning, surveying, designing, constructing, repairing, using or maintaining BIA roads on reservations). Therefore, since Arizona has no interest related to the road construction projects, save tax it, the imposition of the transaction privilege tax unduly burdens tribal self-government and sovereignty.

CONCLUSION

For the foregoing reasons, *amici* requests that the United States Supreme Court affirm the opinion by the Arizona Court of Appeals.

Dated August 20, 1998

Respectfully submitted,

RICHARD T. TREON
Counsel of Record
TREON, STRICK, LUCIA
& AUGIRRE

2700 North Central Avenue
Suite 1400
Phoenix, AZ 85004-1113
(602) 285-4400

STEVE M. TITLA
KEVIN L. PARSI
TITLA & PARSI, Attorneys at Law
Attorneys for Amicus Curiae
San Carlos Apache Indian Tribe
P.O. Box 1143
Globe, Arizona 85502
(520) 425-8137